Filed 8/13/13 P. v. Luis CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS LUIS, Defendant and Appellant.	B240741 (Los Angeles County Super. Ct. No. KA086030)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis Rappe, Judge. Affirmed.

Stephen B. Bedrick, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Carlos Luis was convicted, following a jury trial, of first degree murder in violation of Penal Code[1] section 187 and second degree fetal murder. The victims were his wife Bertha Luis and her unborn child. The jury found true the special circumstance allegation that appellant committed multiple murders within the meaning of section 190.2, subdivision (a). The trial court sentenced appellant to life without the possibility of parole for the first degree murder plus 15 years to life for the fetal murder.

Appellant contends there was insufficient evidence to support the first degree murder conviction. He also contends the trial court erred by admitting expert testimony on appellant's mental state, admitting hearsay that appellant threatened to kill Bertha's father, and instructing the jury that appellant could be convicted of second degree murder on the theory that he failed to seek medical help. We affirm the judgment of conviction.

I. FACTS

A. Prosecution

1. The Police Discover the Body of Bertha Ramirez Luis

On Monday, September 1, 2008, in the late afternoon, paramedics were called to a residence on Stichman Avenue in Baldwin Park. The house belonged to appellant's mother Guadalupe Arguijo. Appellant, his pregnant wife Bertha and their two children, seventeen-year-old Anthony and eleven-year-old Cassandra ("Cassie"), also lived there. At 4:54 p.m., Baldwin Park Police Officer Edwin Tapia went to the residence and learned from paramedics that Bertha was dead. Officer Tapia went into the bathroom and saw Bertha on the floor. Bertha was cold to the touch. She had a small cut on her lower lip and there was blood on the side of her cheek and on the nearby floor. There were no other visible signs of trauma.

Officer Tapia spoke with appellant, who was "distraught." Appellant said he was in the garage at about 10:30 a.m. when his son Anthony told him he had heard a "loud thump" in the bathroom. Appellant forced his way into the bathroom and saw Bertha

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[1] Further statutory references are to the Penal Code unless otherwise noted.

leaning against the wall. He asked her if she was okay, and she replied that she was. Appellant believed Bertha was drunk, and decided to leave her in the bathroom to "sleep it off." He put underwear on her, placed a pillow under her head and covered her with a blanket. He left the bathroom, but returned every 15 minutes to check on her. She appeared to be sleeping each time he checked on her. Appellant last checked on Bertha at 1:30 p.m. At 4:45 p.m., his mother asked him to check on Bertha. He did, and discovered she was not breathing.

2. The Police Investigation Uncovers a History of Abuse of Bertha

Police detectives investigated Bertha's death. They learned that numerous members of Bertha's family had observed many instances of past physical and mental abuse of Bertha by appellant. The abuse began when Bertha was 15 or 16 and started dating appellant. Bertha soon left home to live with appellant. Family members consistently observed appellant physically and emotionally abusing Bertha. Appellant often denied he hit Bertha, or claimed that they were just "playing." In 2001, however, while Bertha and appellant were estranged and living apart, appellant admitted to Bertha's mother that he hit Bertha, but claimed that it was caused by his addiction to drugs and alcohol. Appellant also admitted to Bertha's brother Jorge that he hit Bertha, but claimed that it was due to his drug use.

Bertha eventually moved back in with appellant. In September, 2007, Bertha told her sister she wanted to leave appellant but was afraid that, if she did, appellant would both tell the police that she had kidnapped the children and would kill Bertha's father.

According to family and friends, Bertha was again planning to leave appellant before she was killed. In May 2008, Bertha told her sister Georgina that she was planning to move back in with her family. About three months before her death, Bertha told her brother Rodolfo that she was going to leave appellant when Anthony was18 years old. About a month before her death, Bertha met Rodolfo for breakfast. Bertha said she planned to move to Pasadena, close to where she worked. In August 2008, Bertha also spoke with her sisters about leaving appellant. She told her sister Jackie that

appellant was "running around with hoes."[2] Bertha said she wanted to live with Jackie. Bertha also called her sister Aracely from work, said that she was thinking of leaving appellant and asked if she could stay with Aracely. Aracely agreed.

About a week and a half before her death, Bertha spoke with family friend Cecilia Madrid on the telephone. Bertha said she knew appellant was having an affair with Jeanette Mata. Bertha mentioned that Aracely was coming over to get some of Bertha's belongings.

Madrid went to Bertha's house a few days before Bertha's death. Madrid saw bruises on Bertha's forearm and injuries to one side of Bertha's face. Bertha showed Madrid a bruise in the shape of fingers and said it was where appellant had grabbed her. Bertha said appellant had also broken her phone.

Madrid saw appellant later that day. According to Madrid, appellant was a drug dealer and she regularly visited him to get methamphetamine. He sold the narcotics from his garage. Madrid told appellant that Bertha was angry and was going to leave him. Appellant said, "She ain't going to leave."

3. Detectives Interview Appellant

Detectives Real and Hendricks interviewed appellant on September 16, 2008. Appellant acknowledged he and Bertha argued. He denied he ever hit Bertha, but admitted he "pushed" or "smacked" her. Appellant acknowledged he was having an affair with Jeanette Mata at the time of Bertha's death. He told Bertha about this affair a couple of weeks before her death. Appellant was not planning on leaving Bertha. As far as appellant knew, Bertha did not plan to leave him.

Appellant told the detectives Bertha was pregnant at the time of her death, but it was an ectopic pregnancy and she could not carry the baby to full term. "It was either going to be the baby or her." Appellant received a letter in the mail saying that an insurance company had approved a procedure to terminate the pregnancy. Bertha told appellant she had an appointment for the procedure.

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[2] Appellant had a girlfriend, Jeanette, while still married to Bertha.

According to appellant, the night before Bertha died, she complained she had a pain in her side, felt dizzy and was thirsty. She had never made these complaints before. Appellant stayed in the garage the entire night. In the morning, Anthony called him and said that something was wrong with Bertha, who was in the bathroom. Anthony could not open the bathroom door. Appellant went to the bathroom, opened the door and found Bertha on the floor. Appellant leaned her against a wall, but she slid off and hit the door. He asked Bertha what was going on, and she replied that she was fine. Appellant believed Bertha was drunk. He left the bathroom to get Bertha some clothes. When appellant returned to the bathroom, Bertha was leaning over the bathtub. He thought he would let her sleep. She put her head on a pillow. Appellant dressed her and covered her with a blanket. He told the children not to go into the bathroom.

Thereafter, appellant checked on her Bertha four times. At some point, he poured water over her to try to get her to "snap out of it." When appellant's mother returned, around 1:00 or 1:30 p.m., appellant took a nap. When he woke up, he checked on Bertha. She was dead. He told his mother and she called 911.

Detective Martin Rodriguez interviewed appellant on February 17, 2009, the same day the sheriff's department executed a search warrant at appellant's residence.[3] During this interview, appellant admitted he had hit Bertha in the past. He claimed that he had "smacked" her with an open hand but had never beaten her. He "might have hit her once or twice" and left bruises on her arm and a black eye. Appellant had kicked Bertha and was "pretty sure" that he had "socked" her in the rib area. He may have hit her hard enough to break a rib, but he was not sure because she never went to the hospital. He could have been responsible for the eight old rib fractures, but not for the fresh one. When one of the detectives said that "the evidence shows that you hit her, that you hit your [w]ife throughout the course of the marriage," appellant said, "I am not denying it."

Appellant said that within 72 hours before Bertha's death, he had "pushed her away." During an argument the day before her death, appellant pushed Bertha away and

[3] A recording of the interview was played for the jury, and the jury was given a transcript of the interview as well.

threw a deodorant can at her. Appellant claimed Bertha did not want the baby she was pregnant with because she was not sure appellant was the father. At trial, however, the parties stipulated that DNA test showed that appellant was included as the potential father of the baby.

4. Cassie Hears the Commotion outside her Bedroom

Cassie was interviewed three times about her mother's death.[4] All three interviews were recorded, and the recordings were played for the jury. At trial, Cassie repudiated a substantial amount of the interviews.

During these interviews, Cassie stated her mom was planning to leave her dad. During her first and third interviews, Cassie stated her dad and mom fought the night before her mom's death, and the argument involved pushing and yelling. The argument occurred because appellant was stopped by police and given a ticket while Cassie was in the car.[5]

Cassie said that on the day of her mom's death, she woke up at about 7:00 a.m., went into the room where her mother was sleeping, and lay down on the bed with her mother for about five minutes. Her mom woke up and smiled at her, then went back to sleep. During the first two interviews, Cassie indicated she went back to her room and stayed there all day. The first time that she noticed something had happened to her mother was when appellant entered her room and told her that her mom had died.

In the third interview, Cassie changed her account and said that after she returned to her bedroom, which was next to the bathroom, she heard a bang or bump in the bathroom. She heard her dad and her brother talking. They were saying, "Are you

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[4] Detectives first interviewed Cassie on September 22 at school. The next interview took place at the Luis residence on February 17, 2009, the same day a search warrant was executed at the family's residence. The third interview took place at the Child Advocacy Center on March 11, 2009.

[5] Cassie expressed some confusion about when appellant got the ticket, at one point indicating that it occurred on Saturday night. At trial, the parties stipulated that appellant received a ticket for amplified sound and tinted windows on in Baldwin Park on Sunday August 31, 2008 at 7:56 p.m.

okay?" Cassie thought her mom said, "Yeah." Thereafter, her brother told her that her mother had fallen but was okay. Cassie believed her mom was sleeping on the floor in the bathroom. Cassie said she did not check on her mother because her dad or possibly her brother told her not to go into the bathroom.

At trial, Cassie claimed that around 11 a.m. to noon on September 1, she heard her mom fall, looked out of her room, saw her dad trying to open the bathroom door, and heard her mom say she was "fine." Either Anthony or appellant told her that her mother had fallen but was okay. From time to time in the afternoon, Cassie looked under the bathroom door to check on her mother and heard her snoring. That evening, her father came into her room and told her that her mother had died.

5. Anthony Hears a "Thump" and Does not Think his Mother is Okay

Anthony testified he was at a friend's house the evening before his mother's death, called Cassie on the telephone and she told him that Bertha "wasn't feeling good." Anthony went home. He found his mom in his grandmother's bed. She said her sides hurt. Anthony explained his mother "didn't look that good" and appeared to be "really tired." She asked for water, which Anthony brought. He placed the house telephone near her and told her to call him on his cell phone if she needed anything. Anthony slept in the living room. His mother called him for water once during the night.[6]

During the night, Anthony did not see any bottles of alcohol in the bedroom and did not smell any alcohol on his mother's breath. He had never seen his mother fall down when she was drunk.

At about 10:00 a.m. the next day, Anthony looked in his grandmother's bedroom, but his mom was not there. He was about to check other rooms when he heard the shower go on. He opened the bathroom door a little and his mom said, "Oh, I'm in here." Anthony closed the door and returned to his room. After a little while, he heard a "loud thump" that sounded like Bertha hit the door and the floor. Anthony tried to turn the

[6] At the preliminary hearing, Anthony had testified that he got water for her about four times during the night.

bathroom doorknob, but it was locked. He heard moaning and asked his mom what was wrong, but she did not reply.

Appellant was able to get the door open. Appellant went inside, partially closing the door. Anthony heard Bertha telling him that she was fine. She was sounded like she was mumbling. Anthony did not believe someone could be "fine" if the person was unable to open the door. Anthony knew his mother would never say she was not fine. According to Anthony, "she could get hit by a truck and she would say she was fine."

Anthony was "concerned" and "pretty scared and worried" about Bertha and thought she needed medical attention. He suggested calling a doctor or an ambulance, but appellant said that they should just call appellant's mother. Anthony and appellant went to the bedroom and started looking for bottles of alcohol because they suspected Bertha was just drunk. Appellant found a bottle of tequila in Bertha's bedroom. Anthony and appellant then searched for and found more bottles. They did not call for medical attention because they simply thought Bertha was drunk. Anthony called his grandmother, who said she was coming home soon.

When Anthony's grandmother arrived, she said that she was going to the store to get ingredients for a soup that Bertha really liked. Anthony left with her and was dropped off at a barbeque. When Anthony left, appellant was on the couch, preparing to take a nap. Earlier, Anthony had seen appellant peek into the bathroom to check on Bertha.

Anthony called home to check on his mother. While he was speaking with his grandmother, he heard appellant yelling and then the telephone was cut off. A friend's father drove Anthony home. On the way, Anthony called again and was able to speak with his grandmother. She said she thought Bertha had died. When Anthony arrived home, police and an ambulance were already there.

6. Guadalupe Arrives Home to Find Appellant Asleep and Bertha Dead

Appellant's mother Guadalupe Arguijo testified at trial. On September 1, 2008, she was at her sister's home in Rialto when Anthony called her around 10:30 or 11:00 a.m. and told her that Bertha had fallen in the bathroom. Arguijo told Anthony that

Bertha should be taken to the doctor if she was not okay. She called Anthony around noon to see how Bertha was doing. Anthony said that Bertha was okay and was sleeping. When Arguijo returned home, she asked appellant how Bertha was doing, and he said she was okay and had fallen asleep in the bathroom. Arguijo looked into the bathroom and saw Bertha on the floor. She was covered with a blanket and appeared to be sleeping.

Arguijo went to the store to buy ingredients for chicken soup. When she returned, appellant was asleep. After appellant woke up, he went into the bathroom. Arguijo heard appellant telling Bertha to "get up." Appellant then yelled for Arguijo to come to the bathroom. She did so and saw that Bertha had passed away. She called the paramedics. They arrived at about 4:30 p.m. and pronounced Bertha dead.

7. The Medical Experts Explain that Bertha's Death Was Not Caused by a Fall

At trial, psychologist Sandra Baca testified as the People's expert on spousal battery. Among other things, she described the cycle of violence in domestic abuse situations. The first part of the cycle involves tension in the relationship. Typically, the victim will try to do everything possible to keep the tension from spilling over into psychological abuse followed by physical violence. Ultimately, the tension evolves into violence. Following the infliction of violence, the abuser will typically show remorse to prevent consequences and "hook" the victim back into the cycle. Sometimes, the abuser will use threats to reach his or her goals. If a victim accepts the apology or agrees to stay because of the threats, the cycle will began again. A victim's pregnancy can be a stress factor resulting in tension spilling over into violence, because the victim becomes less available and attentive to the abuser. A victim's plan to leave her abuser is also a stress factor. In this case, the stress factors of the victim's pregnancy and her plan to leave her abuser were present.

Bertha's autopsy showed she died from a placental abruption with intrauterine bleeding caused by abdominal blunt force trauma. In essence, Bertha bled to death. The autopsy was conducted by Deputy Medical Examiner Vadims Poukens of the Los Angeles County Coroner's Department. Dr. Poukens was unable to determine the time of death. He discovered decomposition, which he opined could have started anywhere from

a few hours to a few days after her death. The autopsy also showed that Bertha was about 25 weeks pregnant at the time of her death. The fetus weighed approximately six pounds. The fetus died because Bertha died.

In addition to the injuries which cause Bertha's death, the coroner discovered older injuries to Bertha, including eight fractured ribs, several with multiple fractures. Some, although not recent, were still healing.

A toxicology report showed the presence of methamphetamine in Bertha's system. Dr. Poukens opined that the methamphetamine was a contributing factor in Bertha's death, in that methamphetamine causes an increase in heart rate and blood pressure, which could have increased Bertha's bleeding rate and accelerated her death. Dr. Poukens concluded the cause of death was homicide.

Dr. Deirdre Anglin, Professor of Emergency Medicine at U.S.C., was an expert in intimate partner violence and emergency medicine. Dr. Anglin reviewed various medical documents relating to Bertha, including the autopsy report, the coroner's investigator's narrative, x-rays, medical and pharmacy records and insurance documents. Based on this review, Dr. Anglin concluded that Bertha's "injuries were consistent with intentional injury and consistent with intimate partner violence."

Bertha's injuries were located on both sides of her body, which was indicative of intentional injury. An accidental injury is typically on only one side of the body. Dr. Anglin noted that Bertha had several rib injuries, some recent, some healing and some older and healed. This indicated significant ongoing trauma, which was consistent with intentional injuries.

Bertha's abdominal injuries were caused by multiple episodes of force. The injuries to Bertha's liver, colon and pancreas, and the placental abruption were caused by substantial force, equivalent to a pedestrian being struck by a car. These injuries were far beyond what would be sustained in a fall from a standing position. All of these injuries are very painful and require narcotics to control the pain.

Dr. Anglin opined that the likelihood of a woman dying from a placental abruption is quite small if she receives prompt medical attention. In the case of a placental injury as

severe as Bertha's, where most of the placenta has pulled from the wall of the uterus, there is a very high mortality rate for the fetus.

B. Defense

Dr. Earl Fuller testified that when more than 50 percent of the placenta is abrupted, the fetus will not survive. The most frequent cause of abruption is hypertension. Methamphetamine use can cause a sudden rise in blood pressure, which can cause an abruption. Blunt force trauma is the cause of only five percent of abruptions. Dr. Fuller opined that Bertha lost blood due to the abruption, which in turn caused her to faint. When she fainted, she hit the edge of the bathtub and the floor, and this caused her other internal injuries.

II. DISCUSSION

1. Murder by torture

Appellant contends, and respondent agrees, that the jury convicted appellant of the first degree murder of Bertha under a murder by torture theory. Appellant further contends that there was insufficient evidence to support such a conviction. We do not agree.

"In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] [I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citations.]" (*People v. Nelson* (2011) 51 Cal.4th 198, 210 [internal quotation marks omitted].)

Under Penal Code section 189, murder by torture is murder in the first degree, provided that (1) the acts causing death involve a high degree of probability of the victim's death and, (2) the torture is premeditated and deliberate, and is inflicted for revenge, extortion, persuasion or any other sadistic reason. (*People v. Cook* (2006) 39 Cal.4th 566, 602.) The defendant need not have an intent to kill. (*Ibid*.)

Appellant contends that there is no evidence that the acts causing death in this case involved a high probability of death. He specifically contends that the testimony of the prosecution's expert Dr. Anglin conclusively proved that the injuries inflicted on Bertha did not involve a high probability of death. Dr. Anglin testified that the likelihood of a woman dying from a placental abruption was less than five percent if she received prompt medical attention.

Dr. Anglin's testimony as a whole, and the coroner's testimony show that appellant's acts did involve a high probability of death. Bertha was hit and kicked so hard that her pancreas, liver, colon and uterus were bruised. Dr. Anglin testified that the force with which the victim was hit was comparable to being hit by an automobile. "[T]hat is something that takes a fair – a fairly significant amount of force so we often will see this kind of thing in a pedestrian that has been struck by a car or, you know, a bicyclist who gets hit by a car or somebody who has sustained substantial force." Dr. Poukens, the deputy medical examiner, acknowledged that Bertha's internal injuries required "quite a bit of force."

Such a severe beating does carry a high probability of death. (See, e.g., *People v. James* (1987) 196 Cal.App.3d 272, 291 [defendant hit victim with force equivalent to victim being hit by a car and ruptured her pancreas; force created a high risk of death of which defendant must have been aware].) When such a severe beating results in death, such a beating is sufficient to support a murder by torture conviction. (*People v. James*, *supra*, 196 Cal.App.3d 272; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 186, 188, 201 [victim died of internal injuries including bruising and lacerations which were caused by kicking with "very strong force, comparable to the injury a child would suffer from forcibly hitting the dashboard of a car during a traffic accident"; evidence of victim's

injuries supported first degree murder by torture conviction]; see also *People v. Cook*, *supra*, 39 Cal.4th at pp.602-603; *People v. Murphy* (1934) 1 Cal.2d 37, 38, 41 [severe beating which caused victim's death constituted torture-murder].)

In addition, "'[t]he finding of murder-by-torture encompasses the totality of the brutal acts and the circumstances which led to the victim's death. [Citations.] The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture.' [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 643.) Dr. Anglin's five percent figure applies only to victims who receive prompt medical attention. Here, Bertha apparently was unable to obtain medical assistance for herself. Appellant ignored his son's request to call for medical assistance or an ambulance and left Bertha on the bathroom floor where she eventually bled to death. Dr. Anglin testified that a person would be in severe pain after receiving a beating like the one Bertha received. Thus, at a minimum, appellant's actions create a reasonable inference that he wanted Bertha to continue to suffer, and his decision to prolong the suffering turned a potentially survivable injury into a fatal injury, a fact which supports the verdict of murder by torture. [7]

2. Dr. Baca's testimony

Appellant contends his counsel was ineffective in failing to object to the following question by the prosecutor and to Dr. Baca's answer:

> Prosecutor: "Dr. Baca, based on your review of the documents that you read and your interviews with some of the witnesses were you able to determine if there was any reason why the defendant may have wanted to inflict pain on his wife on a Labor Day weekend of 2008?"

[7] When a defendant injures a victim and then minimizes the injuries to others to dissuade them from seeking medical help, it is evidence of an intent to kill. (See *People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 202.)

Dr. Baca: "If I recall, there were two stressors going on at the time. The pregnancy and his pushing for an abortion and also because she had verbalized to her family that she had wanted to leave."

Appellant has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) "'Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citations.]'" (*People v. Thomas* (1992) 2 Cal.4th 489, 530-531.)

When an appellant makes an ineffective assistance claim on appeal, we look to see if the record contains any explanation for the challenged aspects of the representation. If the record is silent, then the contention must be rejected "'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation [citation].'" (*People v. Haskett* (1990) 52 Cal.3d 210, 248.)

We note that our Supreme Court has repeatedly pointed out that "'[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel.' [Citation.]" (*People v. Avena* (1996) 13 Cal.4th 394, 421.)

a. Form of the question

Appellant contends that the question was compound and assumed facts not in evidence. He specifically contends that the question contains two sub-questions: (1) did appellant want to inflict pain on his wife? and (2) what were the reasons appellant wanted to do that? He next contends that it assumed that appellant did in fact want to inflict pain. It is difficult to understand how the same question could assume that appellant in fact

wanted to inflict pain and at the same time ask the witness to decide *if* appellant wanted to inflict pain. In any event, we do not agree that the question does either.

The question uses the phrase "may have wanted" which uses the auxiliary verb "may" to express possibility. (www.merriam-webster.com/dictionary/may) Thus, the question as a whole does not imply that appellant in fact wanted to inflict pain. Further, the witness's answer demonstrates that she did not understand the question as asking for her opinion on whether appellant intended to inflict pain. She offered no opinion about whether appellant wanted to inflict pain. She simply identified stressors in appellant's life.

Since the question is not improper in form, counsel acted reasonably in refraining from objecting to the question. "[A] defense counsel is not required to advance unmeritorious arguments on [a] defendant's behalf." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1173; see also *People v. Price* (1991) 1 Cal.4th 324, 386-387.)

b. Substance of the question

Appellant contends that the question improperly asked the expert to testify as to appellant's state of mind or intent in hitting Bertha. He points out that one element of torture murder is that the defendant deliberately and with premeditation intended to inflict extreme pain and suffering and a second element of the crime is that the defendant intended to inflict such pain for an enumerated purpose. He concludes that since intent is an element of torture murder and thus an ultimate issue in the case for the jury to decide, expert testimony on this issue was admissible.

"Despite the circumstance that it is the jury's duty to determine whether the prosecution has carried its burden of proof beyond a reasonable doubt, opinion testimony may encompass 'ultimate issues' within a case. Evidence Code section 805 provides that '[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.' (See *People v. Valdez* (1997) 58 Cal.App.4th 494, 507, 68 Cal.Rptr.2d 135 [a gang expert testified that the defendant was a member of a particular gang and that his activities were undertaken on behalf of the gang].)" (*People v. Prince* (2007) 40 Cal.4th 1179, 1227.)

Here, Dr. Baca did not directly testify that appellant intended to hurt Bertha, premeditated the infliction of pain on Bertha or inflicted pain for a particular purpose. Dr. Baca simply identified stressors in the relationship between appellant and Bertha. Dr. Baca had previously testified about various factors which can be precursors to violence in domestic abuse situations. Two such factors are the victim's pregnancy and the victim's plan to leave the abuser. Thus, Dr. Baca's testimony simply informed the jury that there were factors in this case which were known to lead to violence in domestic abuse situations.

c. Prejudice

It took approximately three weeks to present all of the evidence in this case; the record of the trial spans over 2000 pages of reporter's transcripts. Even if counsel should have objected, there is no reasonable probability this isolated question and answer had any material impact on the verdict. Dr. Baca testified about the cycle of violence in general and the jury had evidence that Bertha fit into that cycle because she was pregnant and had spoken about leaving appellant in the days preceding her death. This evidence, combined with the previously discussed overwhelming evidence that appellant severely beat his wife and left her to bleed to death rendered harmless any deficiency in counsel's professional duty. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

3. Death threat

Appellant contends the trial court abused its discretion in admitting testimony from Bertha's sister that appellant threatened to kill Bertha's father. He claims the statement was hearsay and its admission violated his constitutional right to confrontation; was evidence of bad character and violated his constitutional right to due process; and was more prejudicial than probative and should have been excluded under Evidence Code section 352. He further contends the trial court erred in failing to instruct the jury that the statements were admitted for a limited purpose. Appellant contends counsel was ineffective for failing to object to the evidence and request a limiting instruction.

a. The statements

Bertha's sister Jackie testified as follows about a 2007 telephone conversation with Bertha:

Prosecutor: "Was there any time during that conversation that Bertha discussed her plans whether she was going to stay at the home or not?"

Jackie replied: "She told me she was going - - she wanted to leave."

Prosecutor: "What did she say about that?"

Jackie: "She started off by telling me that [appellant] treated her like shit. . . I told her I would go pick her up and she said that before she left she had to let the police know. And I asked her why and she said she needed to tell them what she was going to do, that she was going to leave [appellant] because [appellant] could go back and say that she kidnapped the kids."

Prosecutor: "Did she say what her other concerns were?"

Jackie: "That he would kill my dad."

Prosecutor: "So that's what she was afraid of?"

Jackie: "She was afraid of him doing - - getting mad and going to the cops and telling them that she had kidnapped the kids and also killing my dad. [¶] And I asked her why my dad and she said because he knew that my dad was important to her."

As appellant acknowledges, Bertha does not directly state in this conversation that appellant threatened to kill her father. Bertha made the statement about her father to explain why she was not yet prepared to leave appellant. The statement showed Bertha's state of mind to explain her conduct, an exception to the hearsay rule. (Evid. Code § 1250.) Appellant points out that section 1250 contains a relevancy requirement. He contends that Bertha's state of mind in 2007, a year before her death, was not relevant to any issue involved in that death and should not have been admitted.

Even if Bertha's state of mind in 2007 should have been excluded as irrelevant or under Evidence Code section 352, appellant is not entitled to appellate relief because he has failed to demonstrate the evidence was prejudicial to his case. (*People v. Hall* (1986) 41 Cal.3d 826, 836; *People v. Watson* (1956) 46 Cal.2d 818, 837.)

Appellant's claims of prejudice from Bertha's statements are based on his premise that the statements imply appellant made explicit threats to kill Bertha's father. But, Jackie's testimony as a whole shows the opposite. Jackie testified she asked Bertha "why [our] dad" and Bertha replied "because he knew that [our] dad was important to her." Bertha did not say "because appellant threatened to kill our dad if I left." If Bertha's fear was based on actual threats by appellant, the natural response would have been to say so. She did not. Bertha's statement cannot reasonably be understood to imply that appellant had made explicit threats to kill her father. The statement shows only Bertha's own beliefs.

Bertha's fear of appellant may have cast appellant in a negative light, but this fear pales in comparison to the overwhelming evidence of the actual physical violence appellant inflicted on Bertha over the course of the 18 years they were together. There is no probability that Bertha's statements contributed to the verdict against appellant, or that appellant would have received a more favorable verdict if the evidence had been excluded. [8]

[8] Although appellant's counsel did make a general objection during trial that the statements were hearsay, he did not provide any specifics of the objection. As the trial court pointed out, there had been an earlier hearing on this issue. During that hearing, appellant's counsel had agreed that Bertha's statement of intent to leave appellant was admissible as evidence of Bertha's state of mind. Counsel offered no explanation for his change of position, and did not press the court for a ruling on his new objection. Accordingly, the state law claim is forfeited. (*People v. Tully* (2012) 54 Cal.4th 952, 1046.) Appellant did not make a timely and specific objection that the testimony violated his right to confrontation, and so this claim is also forfeited. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809.) To the extent appellant argues his trial attorney was ineffective for failing to object or request a limiting instruction, we reject the claim based on an inadequate showing of prejudice. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

4. Second degree murder

Appellant contends that the trial court erred prejudicially in instructing the jury that he could be liable for second degree murder for Bertha's death based on his failure to seek medical care for her.

Even if second degree murder cannot be based on a defendant's failure to seek medical assistance, appellant suffered no prejudice. (*People v. Wilkins* (2013) 56 Cal.4th 333, 350 [misinstruction on elements of offense reviewed to determine whether error is harmless beyond a reasonable doubt].) The effect of such an error would have been to permit the jury to convict appellant of second degree murder for acts which only amounted to involuntary manslaughter. The jury did not convict appellant of second degree murder for Bertha's death. Appellant has not established that the alleged instructional error defining a crime for which he was not convicted had any impact on the result of his trial.

In a supplemental opening brief, appellant contends the second degree murder instruction erroneously failed to tell the jury that second degree murder can only be based on an omission if the omission is accompanied by a conscious disregard for human life. He claims that this omission was prejudicial because it created a "great overlap" between the second degree murder instruction and the involuntary manslaughter conviction, which would cause the jury to believe that it could not convict him of involuntary manslaughter without also convicting him of second degree murder. We do not agree.

Appellant describes the second degree murder instruction as being divided into two parts, the first dealing with murder based on a defendant's affirmative act and the second being based on a defendant's omission. He acknowledges that the first part of the instruction tells the jury that it must find that a defendant deliberately committed his act with conscious disregard for human life. Appellant points out, correctly, that this reference to conscious disregard for human life is not repeated in the second part of the instruction concerning failure to seek medical aid. The instruction must be considered as a whole, and in context with other instructions. (*People v. Bolin* (1998) 18 Cal.4th 297, 328.) In other words, we must decide in light of the entire charge to the jury, whether it

is reasonably likely the jury interpreted the instructions as excluding conscious disregard for human life as an element of second degree murder. (*People v. Loy* (2011) 52 Cal.4th 46, 74.)

The instruction on murder provided that a murder conviction requires a finding of express or implied malice. The instruction explained that a defendant acted with implied malice if he intentionally "committed an act" the natural and probable consequences of which were dangerous to human life and "[a]t the time he acted, he knew his act was dangerous to human life; AND . . . He deliberately acted with conscious disregard for human . . . life." The instruction indicated that if the jury found appellant had a legal duty to Bertha and failed to perform it, the failure to act was "the same as doing" an act. Thus, a reasonable jury would have understood the instructions as stating that a murder conviction required a finding that appellant knew that his failure to act was dangerous to human life and acted with conscious disregard for human life.

In contrast, the instructions on involuntary manslaughter required a finding appellant was criminally negligent. The instruction defined criminal negligence, explaining that it "involves more than ordinary carelessness, inattention, or mistakes in judgment. A person acts with criminal negligence when: [¶] 1. He acts in a reckless way that creates a high risk of death or great bodily injury; [¶] AND [¶] 2. A reasonable person would have known that acting in that way would create such a risk." Thus, we disagree with appellant's assertion that the two instructions "overlap."

Even assuming, as appellant contends, the absence of clarifying language in the second degree murder instruction gave the jury the impression that the mental state for second degree murder and involuntary manslaughter were equivalent, we emphasize that the jury *rejected* involuntary manslaughter in favor of a first degree murder conviction. It stands to reason the inclusion of clarifying language in the second degree murder instruction that emphasized the prosecutor's additional burden of showing conscious disregard for life would have met the same fate as the second degree murder and involuntary manslaughter instructions provided by the court—the jury would have rejected them in favor of a first degree murder conviction. Appellant has not shown

otherwise. (*People v. Parson* (2008) 44 Cal.4th. 332, 357 [appellant must show that, but for the alleged instructional error, there was a reasonable probability the result of the trial would have been more favorable to him].)

5. Cumulative error

Appellant contends that even if the above described errors were not prejudicial considered individually, their cumulative prejudice requires reversal. Appellant offers no argument to support this contention and provides only general case law on cumulative error. He has failed to demonstrate cumulative prejudice. (See *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19 [appellant has the burden to support argument with legal analysis].)

III. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KUMAR, J.*

We concur:

TURNER, P.J.

MOSK, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.